United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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75-7600

To Be Argued by
ROBERT J. SISK

United States Court of Appeals
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

— against —

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AND
UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

REPLY BRIEF OF DEFENDANTS-APPELLEES BROADCAST MUSIC, INC., *et al.*

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November 13, 1979

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This reply brief is submitted by defendants-appellees Broadcast Music, Inc. ("BMI"), *et al.*, in response to the brief for the United States as *amicus curiae* ("U.S. Brief") submitted by the Department of Justice (the "Department").

PRELIMINARY STATEMENT

The Department's brief is helpful to the Court in setting forth the correct framework for analysis of this case, but its usefulness in making that analysis is severely limited by the Department's conceded unfamiliarity with the trial record. The Department has suggested that the inquiry be framed as follows:

1. "The application of the rule of reason requires a careful assessment of the competitive effects of the conduct in question." (U.S. Brief at 8.)

2. "If the court concludes that no anticompetitive effects stem from the concerted conduct, there is no need for further inquiry; the conduct is lawful." (*Id.* at 13.)

3. "If the court concludes that the . . . activity produces anticompetitive effects . . . [t]he Court must determine whether the anticompetitive effects outweigh any procompetitive results." (*Id.*)

4. "The outcome of such an analysis obviously is dependent on the facts of the case." (*Id.* at 9.)[1]

The Department has also recognized that any "failure of proof" on any of the elements necessary to make out a rule of reason case in the trial before Judge Lasker is "fatal" to CBS' rule of reason argument. (*Id.* at 9.) But, having recognized that the rule of reason analysis is dependent on the facts, the Department has informed this Court that it has not reviewed "the lengthy trial record" to determine what the facts are. (*Id.* at 9, 25 n.18.) This lack of familiarity with the facts has led the Department to adopt an incorrect premise in the principal argument it advances here.

I.

NO ADDITIONAL FINDINGS ARE REQUIRED IN ORDER FOR THIS COURT TO DECIDE THE RULE OF REASON ISSUE PRESENTED BY THE SUPREME COURT'S REMAND.

On the erroneous assumption that there is "undisputed evidence" of three anticompetitive effects, the Department has suggested a remand so that pro-competitive effects may be weighed against them. Two of the alleged non-competi-

1. Judge Lasker followed this approach and found no anticompetitive effects. 400 F. Supp. 737, 747, 779-80 (S.D.N.Y. 1975).

tive characteristics postulated by the Department were disproved at trial and are refuted by the district court's findings. The third, which is demonstrably frivolous, was not even argued by CBS at trial.

A. The Absence of Direct Sales to Networks.

The first non-competitive characteristic postulated by the Department as "undisputed" is that

> "[t]he thousands of music composers and publishers do not offer their works at prices subject to individual negotiation. . . . [U]nlike sellers in a fully competitive industry, they do not seek to obtain exposure by lowering their prices. . . . [I]t would be expected that composers of lesser reputation, or greater financial need . . . , would attempt to obtain network plays by engaging in price competition."

(U.S. Brief at 17.)

The Department's speculation[2] that the absence of direct sales may represent an anticompetitive effect is rebutted by the district court's findings. Judge Lasker specifically found that no direct sales have taken place because no network has ever sought to enter into such sales (*e.g.*, 400 F. Supp. at 753); that copyright owners could and would engage in direct sales at competitive prices if the networks sought them (*id.* at 781); and that, if direct sales were sought by CBS, "copyright owners would line up at CBS'

2. There is really no reason to conclude that the absence of direct network licensing reflects anything other than user preferences. Certainly there is no basis for concluding that CBS prefers direct licensing, since all that it has ever sought in this litigation is a market rigged in its favor. Indeed, a network truly interested in direct licensing would surely have sought at least to "test the waters" in the ten years this litigation has been pending. CBS has instead preferred to keep writers and publishers in economic bondage with a court-set interim fee for a blanket license at 1969 rates.

door. . . ." *Id.* at 768. Indeed, reviewing evidence *offered by CBS,* Judge Lasker concluded:

> "[T]he snippets of testimony on which CBS relies are replete with Darwinian imagery of cutthroat competition [in a direct licensing market] among hungry publishers and writers seeking network exposure."

Id. at 767.

As pointed out at pages 12-16 of our main brief, the Department's argument here is flawed because it fails to recognize that the absence or occurrence of direct sales is entirely at the networks' option; the copyright owner simply has no control or choice over the networks' method of licensing. *See* Comment, CBS v. ASCAP: *Who Calls the Tune? Performing Right Societies and the Rule Against Price Fixing,* 31 Rutgers L. Rev. 720, 754 (1978).

B. "Price Discrimination."

The second "deviation from a competitive market" theorized by the Department is the undisputed fact that the three national networks pay differing fees for their ASCAP and BMI blanket licenses. (U.S. Brief at 17.) The Department suggests that this "price discrimination . . . may manifest collective market power . . . ." (*Id.* at 18.)

This contention is just plain silly, and CBS wisely did not raise it at trial. One might just as well argue that a rock group could not charge more to appear at Yankee Stadium than it charged for playing at a neighborhood bar. CBS itself charges advertisers differing amounts for the various stations in its network depending on the size of the audience: the advertiser pays nearly 200 times as much to appear on WCBS in New York as it does to appear on KWRB in Wyoming.

The amounts networks receive from advertising revenues vary with the size of their audiences. The rights which BMI licenses are *performance* rights. It is clearly appropriate for BMI (or any other licensor) to charge more for a license to the network which performs music before the largest audiences, just as it is clearly appropriate to charge the network more than a neighborhood tavern.[3]

C. The "Costs and Risks" to CBS in Switching to Direct Licensing.

The Department's final hypothesized anticompetitive effect is that the blanket license might make CBS' switch to direct licensing more difficult or more costly. (U.S. Brief at 18.) The Department argues that the district court's finding that copyright owners would not refuse to deal with CBS if it abandoned the blanket license, "does not by itself preclude a finding that they *might* make the terms of direct dealing sufficiently onerous to frustrate CBS' efforts in that regard." (*Id.* at 19; emphasis added.) The Department's argument is contrary to the record and is contrary to what Judge Lasker actually found.

The district court's inquiry went far beyond a mere inquiry into whether a "refusal to deal" with CBS would occur. A fair reading of Judge Lasker's opinion demonstrates quite clearly that the district court fully considered, and rejected, CBS' contention that it could not realistically license directly because the copyright owners would make it unreasonably difficult to do so. One of the principal sections of Judge Lasker's opinion was entitled *"Would Copy-*

3. Taken to its logical conclusion, the Department's price discrimination argument would call into question the validity of all agreements in which rights are licensed on a percentage-of-revenue basis. We are confident that the Supreme Court's re-affirmation in this case of *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950), upholding percentage-of-revenue licensing agreements, constitutes a rejection of any such result. 99 S. Ct. 1551, 1556-57 n.13 (1979).

right Owners Attempt to Thwart Direct Licensing?" 400 F. Supp. at 765.[4] In that section, Judge Lasker summarized CBS' contentions as follows:

> —"In the absence of proof that direct licensing is unfeasible because of mechanical obstacles *CBS' case rests primarily on its claim that copyright proprietors would* refuse to deal directly if CBS asked, or *at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement," id.* at 765;
>
> —"[*T*]*he issue is* not what CBS or copyright proprietors perceive their respective risks to be, but *whether CBS has established that its fear that copyright proprietors would in fact attempt to thwart a direct licensing attempt is justified," id.* at 766-67. (Emphasis added.)

After reviewing CBS' evidence in detail, the district court found CBS' claims of "disinclination," "hold-ups," and "boycott" on the part of individual copyright owners to be without merit. For example, Judge Lasker found:

> —"[T]his is not proof that defendants have created 'barriers' to direct licensing in order to compel CBS to take a blanket license . . . ," *id.* at 765;
>
> —"Darwinian . . . cutthroat competition [would exist in a direct licensing market] among hungry publishers and writers seeking network exposure," *id.* at 767;
>
> —"[T]here is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license," *id.* at 779;
>
> —"Copyright proprietors are keenly aware that their compositions are substantially interchangeable

4. The district court stated that "in a substantial sense, the 'disinclination issue' [explored in this section of the opinion] is the major factual issue in the case." 400 F. Supp. at 765.

with the compositions of other writers and publishers, a factor which could well be expected to dissipate any 'disinclination' to deal with CBS, which might otherwise exist," *id.* at 771;

—"[O]n CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure," *id.*;

—"[C]BS has not proven that its fears of a 'hold-up' by copyright proprietors are justified," *id.* at 776;

—"Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear . . . that any resistance they might manifest would quickly dissolve . . .," *id.* at 779; and

—"[F]or direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur," *id.*

* * *

The Department's criticism of the district court for not considering "less restrictive alternatives" is unjustified. CBS conceded at trial that the blanket license offered significant benefits to the network user[5] and thus took upon itself the burden of establishing that these benefits could be preserved in a less restrictive way. The only way

5. In its Post-Trial Reply Brief in the district court, CBS stated (at 13):

"From the networks [*sic*] buyers' standpoint ASCAP offers: (a) the transactional efficiencies of dealing with one common-licensing agent rather than hundreds of individual copyright proprietors; (b) insurance against the risk of litigation for unintentional infringements; (c) indemnification against infringements (whenever use of the music has been cleared by ASCAP); and (d) relief from whatever portion of the incremental transactional costs of direct licensing would be incurred directly or passed on to the networks in a direct licensing system. . . ."

offered by CBS at trial was the per use license,[6] which the Supreme Court found, and the Department concedes, is *more* restrictive than the blanket license. 99 S. Ct. at 1561 n.27; U.S. Brief at 26 n.19; *see* Comment, CBS v. ASCAP: *Who Calls the Tune? Performing Right Societies and the Rule Against Price Fixing," supra,* 31 Rutgers L. Rev. at 754.

Neither CBS nor the Department is free now to begin a search *in vacuo* for some hypothetically less restrictive alternative to the challenged conduct. Such substitution of post-trial speculation for facts adduced at trial would improperly usurp the trier of fact's responsibility. CBS has had more than its day in court and must stand or fall by "the evidence adduced or not presented by CBS under the various legal theories it has advanced in this litigation." (U.S. Brief at 25 n.18.) To indulge CBS or the Department now would be particularly unconscionable when CBS has held writers and publishers in economic bondage for a decade without a viable theory of liability.[7]

---

6. The alternative remedy sought by CBS of an injunction against network blanket licensing contemplated removing the benefits from the marketplace entirely rather than achieving them in some other way.

7. The Department's statement that the consent decree which governs BMI's operations is "not material to the antitrust analysis of the blanket license" (U.S. Brief at 3 n.2) is difficult to reconcile with the Supreme Court's opinion, holding that: "[T]he decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice." 99 S. Ct. at 1559.

In its prior opinion, this Court suggested that the ASCAP consent decree was not relevant to the issues in this case because "it is not even clear that the problems presented in this action are coeval with those which surfaced almost 30 years ago when this decree was negotiated." 562 F.2d at 139 n.25. This observation has no application to the BMI decree, which was negotiated by the Department in 1966—after twenty years of music licensing by the networks, after twenty years of experience by the Department and BMI operating under the original BMI consent decree, and just three years prior to the institution of this suit.

II.

IF ADDITIONAL FINDINGS ARE REQUIRED, THE DISTRICT COURT SHOULD MAKE THEM ON THE BASIS OF THE EVIDENCE ADDUCED AT TRIAL.

All of the parties to the case have expressed the view that the record and findings are sufficient for this Court to decide the rule of reason issue presented by the Supreme Court's remand. *See* CBS Appeal Brief at iv, 29-30 n.18; BMI Appeal Brief at vii, 9 n.6; ASCAP Appeal Brief at iv. If this Court should disagree with the parties and accept the Department's view that additional findings are required, such findings should be made by the district court on the basis of the evidence adduced at trial.

Ordinarily, appellate courts will not make findings of fact on appeal. *E.g., Finney* v. *Arkansas Board of Correction,* 505 F.2d 194, 212 n.16 (8th Cir. 1974) ("While this court may review a decision in the absence of factual findings, it may not make its own findings of fact."); *Lee* v. *Beto,* 429 F.2d 524, 525 (5th Cir. 1970); *Davis* v. *United States,* 422 F.2d 1139, 1142 (5th Cir. 1970). The fact-finding function properly belongs to the district court, which has heard all the witnesses and received all the evidence. *DeMarco* v. *United States,* 415 U.S. 449, 450 n. (1974). The wisdom of this practice is particularly apparent in cases like this one, where numerous witnesses have testified and the record is lengthy.

CONCLUSION

For all the reasons set forth above and in BMI's main brief, the order of the district court should be affirmed in all respects.

Dated: New York, New York
November 13, 1979

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AFFIDAVIT OF SERVICE

MARIO A. ROSADO, being duly sworn, deposes and says that he resides at 820 Thieriot Avenue Bronx, N.Y. 10473; that on the 13 day of November, 1979, he served the within Reply Brief of DEFENDANTS-APPELLES BROADCAST MUSIC, INC., et al.

on the attorneys for Plaintiff, Co-Defendants and Amici Curiae

herein by mailing a true copy thereof, securely enclosed in a post-paid, properly addressed wrapper, in the mail box under the exclusive care and custody of the United States Postal Service at the corner of Wall Street and Broadway, New York, New York, addressed to said attorneys as follows:

SEE ATTACHED LIST

The above addresses has appeared on the prior papers in this action as the office addresses of said attorney .

Deponent is over the age of 18 years and not a party to this action.

Maria A. Rosado

Sworn to before me this
13th day of November, 1979.

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